

No. 46566-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

URSULA RUTH EDITH SCHNEIDER, as Personal Representative for the Estate of
HEINZ GERHARD SCHNEIDER, deceased,

Appellant,

v.

BARTELLS ASBESTOS SETTLEMENT TRUST, et al

Respondents.

Appeal from Clark County Superior Court,
Case No. 13-2-02291-9 (Judge John F. Nichols)

FILED
COURT OF APPEALS
DIVISION II
2015 MAR 16 PM 3:32
STATE OF WASHINGTON
BY *CM*
DEPUTY

OPENING BRIEF OF APPELLANT

Meredith Boyden Good, Esq.
Attorney for Ursula Ruth Edith
Schneider, Appellant

BRAYTON PURCELL, LLP
806 SW Broadway, Suite 1100
Portland, OR 97205
503-295-4931
WSBA # 39890

TABLE OF CONTENTS

I.	Introduction	1
II.	Assignments of Error	4
III.	Statement of the Case	5
IV.	Legal Argument	13
	A. A Wrongful Death Action Cannot Accrue Until There is a Death.....	13
	B. The Wrongful Death Statute Creates a New and Distinct Cause of Action for the Benefit of the Heirs.....	14
	C. The Case Law Does Not Support The Defendants' Position or the Court's Decision.....	18
	1. Calhoun v. Washington Veneer Co.....	18
	2. Johnson v Ottomeir.....	20
	3. Cases From Other Jurisdictions.....	23
	D. Policy Supports the Plaintiff's Position Here	26
V.	Conclusion	28

TABLE OF AUTHORITIES

Table of Cases

<i>Allen v. State</i> , 118 Wn.2d 753 (Wash. 1992).....	2
<i>Atchison v. Great W. Malting Co.</i> , 161 Wn.2d 372, 166 P.3d 662 (Wash 2007).....	16
<i>Calhoun v. Washington Veneer Co.</i> , 170 Wn 152, 15 P.2d 943 (1932).....	18, 19
<i>Castorena v. GE</i> , 149 Idaho 609 (Idaho 2010).....	25
<i>Cook v. Rafferty</i> , 200 Wash. 234, 93 P. (2d) 376 (1939).....	24
<i>Dodson v. Continental Can Co.</i> , 159 Wash. 589, 294 P. 265 (1930).....	1, 15
<i>Gevaart v. Metco Constr., Inc.</i> , 111 Wn.2d 499, 760 P.2d 348 (1988).....	2
<i>Grant v. Fisher Flouring Mills Co.</i> , 181 Wash. 576, 44 P2d 193 (1935).....	13
<i>Gray v. Goodson</i> , 61 Wn.2d 319 (Wash. 1963).....	15, 24
<i>Johnson v Ottomeir</i> , 45 Wn.2d 419, 27 P.2d 723 (1954).....	20, 22
<i>McAuliff v. Parker</i> , 10 Wash. 141, 38 Pac. 744 (1894).....	14
<i>Riggs v. Georgia Pacific</i> , 20156 UT 17.....	25
<i>Warner v. McCaughan</i> , 77 Wn.2d 178, 460 P.2d 272 (Wash. 1969).....	16
<i>White v. Johns-Manville Corp.</i> , 103 Wn.2d 344, 693 P.2d 687, (1985)	2, 7

Statutes

RCW 4.16.....	1, 2, 4
R.C.W. § 4.20.010.....	4, 13
ORS § 30.020.....	23

I. INTRODUCTION

The defendants in this matter convinced the trial court to enter a ruling which is not only contrary to the plain statutory language, but illogical and unjust.¹ That ruling interprets Washington law concerning the statute of limitations governing an action for wrongful death. The plaintiff, Mrs. Schneider, filed an action for the wrongful death of her husband. The defendants argued, and the court ruled, that Mrs. Schneider's cause of action was time barred, *five years before* Mr. Schneider died!

Washington's wrongful death statute does not contain an express statute of limitation; rather, it is governed by R.C.W. 4.16, which sets forth the statutes of limitation applicable to different types of actions. *Dodson v. Continental Can Co.*, 159 Wash. 589, 591-92, 294 P. 265 (1930).

¹*See, Wills v. Kirkpatrick*, 785 P.2d 834, 837 (Wash. Ct.App. 1990). "we would have the situation where such a claim could be barred even before death triggers accrual of the right to bring the action." . . . "Such a result seems to us illogical and unjust."

Wrongful death actions are governed by the 3-year statute of limitations. *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687, (1985) (applying the "catchall" 3-year statute of limitations of R.C.W. 4.16.080(2) for wrongful death claims). Consequently, a wrongful death action must be brought within 3 years of the date when the action accrues.

Allen v. State, 118 Wn.2d 753, 757-758 (Wash. 1992)

It is agreed that the three-year tort statute of limitations (R.C.W. 4.16.080(2)) applies to the present action. And R.C.W. 4.16.005 provides: "[A]ctions can only be commenced within the periods provided in this chapter *after the cause of action has accrued.*" (emphasis added)

So when does the wrongful death cause of action accrue and the three-year statute begin to run? A cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action. See *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348 (1988); *White, supra*, 103 Wn 2d at 348. The plain language of the wrongful death statute makes it clear that a **death** is an essential element of the cause of action. There must be the "death of a person" caused by the "wrongful act, neglect or

default of another” before the cause of action can accrue. The defendant’s position here, and the court’s ruling, that the spouse’s wrongful death statute of limitations ran at the same time as the decedent’s personal injury statute of limitations, leads to an illogical result.

Mr. Schneider was still alive when his three year personal injury statute of limitations ran in at least 2006. How could Mrs. Schneider have brought a wrongful death action within that three year period? Yes, she knew her husband had asbestos related disease. But she did not know, and could not know, that the asbestos related disease would cause his death. He might have been hit by a bus walking home from the grocery store; or died in an automobile crash; or drown in a boating accident; or been electrocuted while attempting to repair the family toaster; or succumbed to any of a large number of diseases unrelated to his asbestos exposure.

The argument that the need for repose dictates that the wrongful death action must expire with the personal injury action, is another fallacy. The goal of statutes of limitations, to prevent

claimants from sitting on their rights, is not achieved by barring an action which could not have been brought earlier. Applying the statute that way produces only unfairness and injustice.

II. ASSIGNMENT OF ERROR

The trial court erred when it granted summary judgment in favor of defendants and dismissed plaintiffs' claims after incorrectly deciding that the plaintiffs' wrongful death action was barred by the statute of limitations.

The issue in this assignment of error involves interpretation of the language of the wrongful death statute, R.C.W. § 4.20.010, and its interaction with the applicable three year statute of limitations, R.C.W. § 4.16.080(2). In this case the decedent died on October 29, 2011 and the personal representative filed this wrongful death action on June 23, 2013. The trial court found the action was barred by the statute of limitations because the decedent knew of his injury more than three years before the filing of the wrongful death action.

Where a wrongful death cause of action cannot, by definition,

arise until the occurrence of a **death**, and the law allows three years in which to sue on that cause of action, was it error for the court to find the action time barred, despite the fact it was filed well within the three years of the death, simply because the decedent was aware of his injury before his death and more than three years before the case was filed?

III. STATEMENT OF THE CASE

The decedent, Heinz Gerhard Schneider, worked as a plumber at various locations around Washington and Idaho from 1953 until 1981. During that time he was exposed to respirable asbestos dust from numerous products made by various manufacturers and utilized and disturbed by many entities. (Clerk's Papers (CP) 17-18) As a result of his exposures he developed pleural plaques, asbestosis, restrictive disease, and diffusion defect which were diagnosed no later than May 9, 2003. (CP 20) He died from these asbestos related diseases on October 29, 2011. (CP 19) His personal representative, Ursula Schneider, filed her complaint for wrongful death on June 23,

2013. (CP 3) Several defendants' motions for summary followed thereafter.

Defendant Max J. Kuney Company filed its motion for summary judgment on May 8, 2014, (CP 83) claiming the complaint should be dismissed because the statute of limitations had run. Kuney argued that the decedent's statute of limitations ran three years after he knew of his asbestos related injury. The argument concluded that his knowledge in 2003 meant his statute ran in 2006, and, because his statute had run, it could not be revived by his death in 2011.

Plaints opposed the motion pointing out that under Washington law a wrongful death action is a new cause of action for the sole benefit of new and different plaintiffs. It is not derivative of the decedent's personal injury cause of action. Accordingly, the action had its own three-year statute of limitations, and since it was filed only twenty months after the death, it was timely. (CP 90-105) On June 19, 2014 defendant Grinnell, LLC joined in the motion filed by Kuney, adopting all the arguments in that motion, and requesting

dismissal of all claims as untimely. (CP 111-115) The following day, June 20, defendant Neups, Inc. filed its own motion, asserting the same statute of limitations arguments. (CP 117-127) That day, the court heard argument on the Kuney motion. (Report of Proceedings (“RP”) Vol. I, pg 2)²

At argument, the parties agreed there was no dispute as to the date of the decedent’s knowledge of his disease, or that of the personal representative, or any question concerning a “discovery date.” Plaintiff asserted the statute could not begin to run until the elements of the cause of action were complete, and that meant there first had to be a death. Defendant argued that decedent’s failure to bring an action for his injuries barred his personal representative from bringing the action for his death.

The trial court focused on the following language in *White v. Johns-Manville*, 103 Wn2d 344 (1985):

²The cover of the Record of Proceedings, Vol. I, indicates it occurred on July 18, 2014, but that was the date of the second hearing which is reported in Vol II of the Report of Proceedings. Page 2 of Vol. I makes it clear the hearing was on June 20, 2014.

Preliminarily, we note we are not faced with, nor do we decide, a case in which the deceased is alleged by the defendant to have known the cause of the disease which subsequently caused his death. In that case there is a question as to whether the wrongful death action of the deceased's representative "accrued" at the time of the decedent's death, when the decedent first discovered or should have discovered the injury, or when the claimant first discovered or should have discovered the cause of death. *See Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982); *Fisk v. United States*, 657 F.2d 167, 170-72 (7th Cir. 1981); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1239 n.6 (N.D. Ill. 1981).

(RP Vol I, 13-14) After discussion of the implications of *White* the court directed the parties to research the matter further and submit additional briefing after which further argument would be conducted on July 18, 2014.

Three days after the initial argument, on June 23, defendant Bouten Construction Company filed a joinder in parts of the Neups motion for summary judgment.(CP 156-157) By July 7, 2014 Neups had reached a resolution with plaintiffs and was no longer in the case. Plaintiff filed an opposition to the joinder by Bouten and the issues raised in the Neups motion. (CP 158) On July 14, Kuney filed

its supplemental briefing in support of its motion for summary judgment (CP 277-285). Plaintiff filed her supplemental response on July 16, and on July 17 defendant Grinnell, LLC filed a supplemental Memorandum of Law in support of the motion. Oral argument was held on July 18.

At the hearing, the court again addressed the issues raised in the *White* case. Addressing the question to be resolved here, the court focused on the discovery rule which was the issue in *White*. This exchange then occurred:

THE COURT: Well, the concept being that if the cause of action died -- I shouldn't use that word. But if it expired during the decedent's lifetime, can it be revived by his death?

MR. RUTTENBERG: Yeah.

MS. GOOD: I have to jump in. The problem is, the cause of action cannot expire when it doesn't exist. You can't have --

THE COURT: Well --

MS. GOOD: -- a cause of action if he hasn't died. You haven't met your elements.

THE COURT: Well, but if -- again, for an example that there's a two-, three-year statute of limitations, it has expired by ten years. He hasn't taken any action whatsoever, even though the cause of action arose, and the day after he dies, they say, Oh, by the way, we have this new cause of action.

It's still in the discovery aspects of it.

It can't be revived by his death. I mean, I think that's what the theory that they were looking at.

(RT, Vol II, 30:23 - 31:18)

Ultimately, the court focused on the lapse of time and the purpose of statutes of limitations:

THE COURT: Let's say it's a car accident.

MS. GOOD: Sure.

THE COURT: And under the car accident, again,

under your theory they could wait thirty years, the guy finally dies related to this injury, shortens his life, and, okay, we can start anew.

MS. GOOD: You can't -- you can't start anew on a personal injury action, you can start anew on separate --

THE COURT: Well, okay --

MS. GOOD: -- damages --

THE COURT: Wrongful --

MS. GOOD: -- for wrongful death.

THE COURT: Wrongful, okay, that's what I'm saying.

MS. GOOD: Uh-huh.

THE COURT: He dies, they bring a wrongful death action.

MS. GOOD: Yes.

THE COURT: Doesn't that defeat the whole purpose of finality, witnesses losing their memory,

evidence disappearing, yadda, yadda, yadda?

(38:24 -39:21)

The court then concluded the necessity for repose determined the outcome.

But I think under the whole theory of the statute of limitations, it's there for a purpose, and I don't think that someone can sit on their rights and then have that expire and then because of someone's death that it resuscitates the cause of action.

It isn't the purpose of the statute of limitations or the wrongful death action. Is the -- I'm not -- I don't want to say standing in the shoes, because it's not a representative, but the cause of action for damages may be there, but the cause of action for the liability has expired.

And I think that's the distinction you have to make.

(RP 42:3- 16)

The court then entered an order granting summary judgment which led to this appeal.

IV. LEGAL ARGUMENT

A. A wrongful Death Action Cannot Accrue Until There is a Death.

The statute which creates the wrongful death cause of action requires a death. R.C.W. 4.20.010 provides as follows:

When the death of a person is caused by the wrongful act, neglect, or default of another his or her personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

The language is clear that a death is necessary to invoke the application of the statute. Until the wrongful act produces a death, there can be no wrongful death action. This simple proposition is repeatedly stated in the case law. The Washington Supreme Court

has held that an action under the wrongful death statute accrues “at the time of death” even though the deceased had pending at the time of his death an action for the injuries which caused his death. *Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P2d 193 (1935).

The arguments of the defendants here, and the ruling by the court, create this illogical result. Plaintiff would have had to sue for the death of her husband five years **before** he died. The Washington Courts have long prohibited such action. "The general holding of the courts is that the statute of limitations does not begin to run until there is some one to sue or liable to be sued, . . ." *McAuliff v. Parker*, 10 Wash. 141, 146; 38 Pac. 744 (1894) In this case, there was no one liable to be sued for the wrongful death of Mr. Schneider until he died. At that time his personal representative had three years to bring an action for that death. He died on October 29, 2011 and the wrongful death action was filed June 23, 2013, well within the three year statute of limitations.

B. The Wrongful Death Statute Creates a New and Distinct Cause of Action for the Benefit of the Heirs

The defense argument boils down to the proposition that the wrongful death statutory claim is derivative of any underlying personal injury claim that an asbestos victim has. The trial court, despite its assertion to the contrary, fell into this same trap. It repeatedly referred to the two claims as if they were a single cause of action.

I don't think that someone can sit on their rights and then have that expire and then because of someone's death that it resuscitates the cause of action.

(RP 42:5-8) But this idea that the wrongful death action is derivative of, or somehow a reanimation of the decedent's claim is a false notion.

The Washington Supreme Court, starting in *Dodson v. Continental Can Co.*, 159 Wash. 589, 294 P. 265 (1930), decided that the wrongful death cause of action accrued at the date of death. In 1963 the court repeated its earlier conclusion that it is a new cause of action for a new beneficiary:

We are here only concerned with the type of wrongful death statute which creates in the beneficiary a new and original cause of action upon the wrongful death. Our statute is of this class. *Upchurch v. Hubbard*, 29 Wn. (2d) 559, 188 P. (2d) 82 (1947).

(*Gray v. Goodson*, 61 Wn.2d 319, 324-325 (Wash. 1963))

This conclusion was reinforced in *Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (Wash. 1969). Discussing the potential actions after a death—a survival action for the benefit of the decedent's estate, and a wrongful death action for the benefit of the heirs—the court made the following observation:

There is a definite distinction between these two claims for damages. The first is dependent upon the "survival statutes." In certain circumstances, the statutes continue the injured person's claim after death as an asset of his estate.

The second claim for damages springs from the wrongful-death statutes which create **a new cause of action** for the benefit of decedent's heirs or next of kin, in accordance with the terms of the statute, based upon the death itself. Although originating in the same wrongful act, the wrongful-death action is for the alleged wrong to the statutory beneficiary. The estate of decedent does not benefit by the action; **the claim of damages for the wrongful death is not one that belonged to decedent.** (*citations deleted*)

(*Warner v. McCaughan*, 77 Wn.2d 178, 179 (Wash. 1969)(emphasis added))

And even more recently, in *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (Wash 2007) the court reemphasized that the wrongful death action accrues at death and can only be brought by a personal representative. As a new cause of action, which could not have been brought by the decedent, the claim accrues, at the earliest, when the decedent victim dies or the personal representative knows the elements of the claim. Until all those elements exist, a claim cannot be perfected.

Mrs. Schneider did not have a claim until her husband died. The death did not, to use the words of the trial court, “resuscitate” a cause of action which the decedent had “sat on” and allowed to “expire.” Rather, it created a new cause of action, solely belonging to the personal representative, and solely for the benefit of the statutory heirs. At that time Mrs. Schneider had three years to bring suit. She did so, well within the time limit. Therefore, her action is not time barred and it was error to rule otherwise.

C. The Case Law Does Not Support The Defendants' Position or the Court's Decision

The defendants claim that case law establishes and affirms the rule they would like to have enforced: that the expiration of the statute of limitations on the decedent's personal injury case bars the personal representative from bringing an action on behalf of the heirs. But that position is not supported by the cases. Neither the facts, the holdings, or the policy reasons expressed in those cases support the conclusion reached below.

1. Calhoun v. Washington Veneer Co.³

The essential point to note when evaluating the holding of *Calhoun* is that it was a worker's compensation case. This fact formed the foundation for the court's ultimate holding that the spouse's attempt to bring a wrongful death action was barred by untimely pursuit of the personal injury action.

In that case, Calhoun worked for the veneer company in a closed gluing room exposed to toxic emissions which eventually

³170 Wn 152, 15 P.2d 943 (1932)

caused him to develop carbon bisulphide poisoning which he alleged was due to the employer's negligence in not properly ventilating the room. His action was filed in September of 1931 and he died on October 17, of 1931. His spouse, as personal representative amended the complaint to be more specific and added a claim for wrongful death. The spouse asserted that her claim was brought under common law principles based upon a breach of the master's duty to exercise ordinary care in furnishing the servant with a reasonably safe place in which to work. (170 Wn 152, 157)

The court reviewed the cases relied upon by the spouse and then pointed out why this case was different.

In this state, we have a different situation. We have the industrial insurance or workmen's compensation act, in which it is provided:

". . . that all phases of the premises are withdrawn from private controversy, . . . and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided." (*Id.* at 158)

The court went on to explain that the spouse did not have a cause of action because the only remaining bases for such action

were the workmen's compensation act and the portions of the factory act which had not been superceded by the workmen's compensation act. Because the injury was in the realm of employment, the employment statutes governed, and the statute did not permit an action because of death, but only because of the injury attributable to the employer.

As we have heretofore determined, the cause of action accruing to Claude Calhoun under the factory act necessarily accrued about the middle of May, 1928. Appellant did not have a cause of action against respondent because of the death of her husband, but because of the negligence of respondent. The negligence was the cause; the death was the result. Under the statute, the claim for damages accrued, if at all, at the time of the injury to Claude Calhoun.

So, while it is technically true that the court held the action was barred due to the passing of the statute of limitations, the circumstances and facts of the case make the holding inapposite here.

2. Johnson v Ottomeier ⁴

Reliance on *Johnson* is similarly inappropriate because,

⁴45 Wn.2d 419, 27 P.2d 723 (1954)

although the court discussed the effect of statutes of limitations on actions for wrongful death, the decision itself was not based on that point. Any language about the effect of the personal injury statute of limitations on the wrongful death statute was merely dicta.

Mr. Ottomeier killed his wife and then killed himself. A personal representative was appointed to administer both estates. Mrs. Ottomeier's son petitioned the court to be appointed representative of his mother's estate. He claimed her estate had a cause of action against the husband's estate and it would be a conflict of interest for the same individual to represent both estates. The trial court denied the petition because the law in effect at the time prevented a wife from suing her husband. Therefore it was argued, her estate was similarly prevented from suing. Although the statute did not limit the wrongful death action in this way, on appeal, the personal representative took the position that the court had previously adopted a broad policy of exclusion preventing actions which could not have been brought by the decedent.

In discussing the application of its case law, the court agreed

that it had, in the past, concluded that there were categories of cases in which the wrongful death action could not be brought because the decedent did not have a cause of action remaining at the time of death. But this dicta was the only reference to such an exclusion. After that discussion the court went on to evaluate the exclusion claimed by the representative.

It was originally the common view that Lord Campbell's Act, 9 and 10 Vict., c. 93, § 1, which first established the right to sue for wrongful death, provided for the survival of a cause of action possessed by the deceased. It is now generally recognized, however, that the act gives to the heirs, or the personal representative on their behalf, a new right of action. Our court accepts this view. (Citations omitted)

* * *

The wife's personal disability necessarily disappears with her death, and hence is not transferable to the personal representative, who has a new cause of action.

Johnson v. Ottomeier, 45 Wn.2d 419, 424 (Wash. 1954).

Far from supporting the defendant's position, *Johnson* actually supports the Plaintiff here. The court made clear that a prior inability to sue on the part of the decedent did not affect the personal representative bringing the wrongful death action. That action came

into being at the time of the death and was unencumbered by the prior spousal immunity. So it is here. The wrongful death cause of action came into being at the time of Mr. Schneider's death. Any inability to sue on his part was not attributable to his personal representative. That action should be allowed to go forward.

3. Cases From Other Jurisdictions

Defendants are fond of citing cases from other jurisdictions which impose limitations on wrongful death causes of action because of an inability of the decedent to sue.⁵ But those compilations do not address the key point for those holdings: the statutory language in place in those jurisdictions. Our neighbor Oregon, for example prohibits a wrongful death suit unless the decedent had a cause of actions. But that limitation is directly stated in the statutory language:

When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, . . . may maintain an action against the wrongdoer, **if the decedent might have**

⁵See, e.g.; MSJ of Neups, Inc, footnote 17 (CP 121-22)

maintained an action, had the decedent lived,
against the wrongdoer for an injury done by the same
act or omission. (O.R.S. § 30.020.)

Obviously, in such jurisdictions, the answer to the question
before this court would be different. But here the language of the
statute has no similar exclusion. And the action itself is purely a
creature of statute; it has no common law precedent.

According to the common law, no civil action could be
maintained by a surviving spouse, child or other close
relative of the deceased person against one who
wrongfully caused the death.

* * *

It was with the spirit of rejecting the bases of the
common law rule and its harsh effects that the
wrongful death statutes were enacted. . . .

Gray v. Goodson, 61 Wn.2d 319, 324 (Wash. 1963) The language of
the statute must control, and no concepts from the personal injury
claim should be used to subvert the intent of the legislature. As the
Supreme Court has stated: “In resolving this issue, we are mindful
that the statute, being remedial in nature, is to be liberally
construed.” *Gray v. Goodson*, 61 Wn.2d 319, 324 (Wash. 1963)
citing Johnson v. Ottomeier, 45 Wn. (2d) 419, 275 P. (2d) [416]

723 (1954); and *Cook v. Rafferty*, 200 Wash. 234, 93 P. (2d) 376 (1939).

Other neighboring jurisdictions, Idaho and Utah, have recently addressed this identical issue and concluded that the new and distinct wrongful death cause of action is not impaired by a prior action brought by the decedent, or by the decedent's failure to bring an action. In *Riggs v. Georgia Pacific*, 2015 UT 17, the Utah Supreme court held that a judgment in favor of the decedent did not bar the personal representative's subsequent wrongful death action against the same defendants. And in *Castorena v. GE*, 149 Idaho 609 (Idaho 2010) the Idaho Supreme Court determined that state's wrongful death statute did not bar an action in a case in which the decedent's personal injury statute of limitations had run. The court observed:

This interpretation has also found support in the Restatement (Second) of Torts § 899 cmt. c (1979), as it pertains to the statute of limitations:

A cause of action for death is complete when death occurs. Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the

representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would have been barred. In some jurisdictions, however, the wrongful death acts take the form of statutes providing for the survival of the decedent's own cause of action, in which case the statute of limitations necessarily runs from the time of his original injury.

(Id. at 619)

Washington has no such restriction. Mrs. Schneider's action was not time barred.

D. Policy Supports the Plaintiff's Position Here.

The trial court relied heavily on the need for repose in applying the statute of limitation. It, incorrectly, stated the action should not be allowed to expire and then be revived by the death. But, as shown it is not a revived, but a new cause of action. Moreover, the policy behind statutes of limitations supports plaintiff here.

Statutes of limitations prevent claimants from sleeping on

their rights, and give defendants repose - allowing them to know that the potential for imposition of liability has passed. These statutes, however, are not intended to allow defendants to escape liability which has just newly arisen. Moreover, they are not intended to deprive claimants of their just compensation when they have vigilantly pursued their rights. "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945).

The policy of judicial economy also is involved. If a claimant had to file a wrongful death cause of action as soon as an injured party became aware of his or her injury, the court would be faced with nonjusticiable and unprovable cases.

[I]f such a person is told . . . that a remedy in court will be barred unless an anticipatory action is filed currently, there will be a powerful incentive to go to court, for the consequence of a wait-and-see approach to the commencement of litigation may be too severe to risk. Moreover, a plaintiff's representative in such a case may be motivated to protract and delay once in court so that the full story of his client's condition will be known before the case is set for trial.

Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 120-121 (D.C. Cir. 1982) Moreover, the law seeks to take into account the interests generally involved in personal injury and death cases: plaintiffs in obtaining at least adequate compensation, defendant's in paying no more than that. The courts remain courts of justice and apply to the law to achieve that justice.

CONCLUSION

The Washington wrongful death statute creates a new and distinct cause of action independent of the decedent's personal injury cause of action. The plain language of the statute requires "the death of a person" before a wrongful death action may be brought. Mrs. Schneider's action was timely under the statute and it was error to dismiss on the mistaken conclusion that the running of the decedent's statute of limitations barred her wrongful death action.

///

///

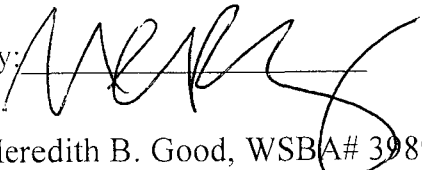
///

For those reasons this court should reverse the judgment of the court
below and remand for trial.

Dated: March 16, 2015

Respectfully submitted,

BRAYTON PURCELL, LLP

By: 
Meredith B. Good, WSBA# 39890

Attorney for Appellant

CERTIFICATE OF SERVICE

URSULA RUTH EDITH SCHNEIDER, as Personal Representative for the Estate of Heinz
Gerhard Schneider, deceased, Plaintiff,

vs.

BARTELLS ASBESTOS SETTLEMENT TRUST, et al.,


**Court of Appeals Division II Cause No. 46566-3-II
Clark County Cause No. 13-2-02291-9**

I hereby certify that on the below date, I served a true and correct copy of

- OPENING BRIEF OF APPELLANT

upon:

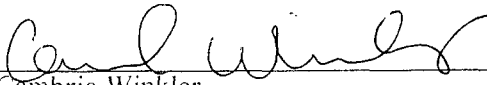
Stephen G. Leatham Heurlin, Potter, Jahn, Leatham, Holtmann & Stoker, P.S. 211 E. McLoughlin Boulevard, Suite 100 Vancouver, WA 98663 sgl@hpl-law.com P: 360 750-7547 F: 360 750-7548	Email-Electronic Service Only
Attorneys for Bouten Construction Co.	
Ronald C. Gardner, WSBA # 9270 Gardner Trabolsi & Associates PLLC 2200 Sixth Ave., STE 600 Seattle, WA 98212 Ph: 206 256-6309 rgardner@gandtlawfirm.com Attorneys for Grinnell LLC (fka Grinnell Corporation, aka Grinnell Fire)	Email-Electronic Service Only
J. Scott Wood, WSBA #41342 Daniel Ruttenberg, WSBA #29498 Bonnie L. Black, WSBA# 44237 Foley & Mansfield, PLLP 800 Fifth Avenue, Suite 3850 Seattle, WA 98104 T: (206) 456-5360 F: (206) 456-5361 asbestos-sea@foleymansfield.com	Email-Electronic Service Only
Attorneys for Max J. Kuney Company	

2015 MAR 16 PM 3:33
STATE OF WASHINGTON
BY 
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

1
2
3 Court of Appeals
4 Division II
950 Broadway, Suite 300
Tacoma, WA 98402

5 DATED this 16th day of March, 2015.

6
7 
8 Cambria Winkler
9 Paralegal

10 **NOTE: PLEASE ADD THE FOLLOWING EMAIL ADDRESS TO YOUR SERVICE**
11 **LIST FOR ALL EMAIL COMMUNICATIONS WITH OUR FIRM:**
12 **portland@braytonlaw.com**
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28